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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 400

LEWIS C. DOUGALL,

Petitioner,

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEWIS C. DOUGALL, pro se
ROGER TILBURY
606 Executive Building,
Portland, Oregon,
Of Counsel for Petitioner

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Respondent's brief is replete with inaccuracies. Petitioner is compelled to reply.

To support its contention that Elton Watkins, one of petitioner's counsel, who died two years ago, suddenly discarded SAA on the eve of the initial hearing (despite its inconsistency with everything prior and subsequent), respondent charges:

1. The motion for trial of the segregated untried issue of Safety Appliance Act was a recent contrivance of petitioner's "new attorney who believes that a prior

litigation should have been conducted differently," that Mr. Watkins made a deliberate choice to abandon SAA and present counsel disagrees with his tactics. Nothing could be further from the facts. Respondent is well aware of the following:

a. Mr. Watkins joined with present counsel in an independent action in the District Court (No. 8635) asking the segregated issue of SAA be tried. The District Judge held the correct procedure was to revive the present action since the right to recover under SAA as a non-employee "was not adjudicated in said cause, but, on the contrary reserved." (Memo Nov. 1, 1956.)

b. Afterwards Mr. Watkins joined with present counsel in preparing the motion which is the subject matter of this petition. He even called respondent's counsel and discussed some of the issues at length. Only his untimely death prevented his personal appearance. He also assisted in the preparation of the motion asking the Court of Appeals clarify its mandate.

c. He insisted throughout his life he did not have the slightest intention of waiving SAA (No. 15544, Tr. 28). Within a few hours of his death, at 75, he reiterated this was the clearest case of injustice he had encountered.

2. Any doubts about this should be dispelled by the record. This complaint is framed under both SAA and FELA (No. 15544, Tr. 1); his tendered pre-trial order enumerated six violations of SAA, six times under

issues of fact, and six times under issues of law (No. 15544, Tr. 31-40); his formal objection to any segregation of the two issues was noted even in the pre-trial order tendered by respondent's counsel (No. 13492, Tr. 12); after respondent's counsel persuaded the Court to separate the two issues for separate determination, Watkins' first statement at the FELA hearing was that he was there only to discuss the first proposition, FELA (No. 13492, Tr. 38-9); the only evidence received related to FELA (No. 13492, Tr. 17, 18, 23, 24); his trial brief stated specifically it was limited to the "first legal proposition," FELA; even findings of fact prepared by respondent noted that FELA had been "segregated for separate trial" (No. 13492, Tr. 17-18). While it is true the same findings state the parties "had stipulated that this action was brought solely under FELA" (No. 13492, Tr. 23-24), this merely meant the segregated hearing was limited to FELA. There was never any intention of abandoning SAA. This is manifest by virtue of the fact that the day *before* these findings were signed Watkins filed formal objections to any conclusion that the case came within the exclusive provisions of FELA (No. 13492, Tr. 26). In his brief in the Court of Appeals, he flatly stated that appellant's rights were to be determined in accordance with the "FELA and the Federal Safety Appliance Act" (No. 13492, Br. 58). In the same brief he set forth admitted violations of SAA on 26 occasions (No. 13492, Br. 3, 4, 8, 45, 46, 47, 48, 50, 57, 58, 62, 63). His subsequent action in asking the judgment be corrected, filing an independent action, and assisting present counsel in preparing motion for

correction of mandate all demonstrate his consistent intention to assert two basis, SAA and FELA.

From a purely logical standpoint, why would venerable counsel for petitioner suddenly throw away a separate independent groups for recovery, particularly when he was so careful to interject it at every stage? The fact is Mr. Watkins looked forward eagerly to presenting this matter and felt keenly disappointed by this colossal run-around.

3. Respondent's counsel also argues it should make no difference that petitioner has been denied his federal rights because "payments of $8,690.70 had been made to petitioner and for payment of hospital and doctor bills" (Br. 7) under state workmen's compensation. And they intimate that large payments may also have been made in the intervening six years (Br. 17). This is a very shocking statement! The parties long ago stipulated that instead of receiving $8,690.70 plus hospital and doctor bills, the payments totaled $8,690.70 of which "$4,826.70 was for hospitalization and doctor" (No. 13492, Tr. 6). Petitioner received only $3,864. And even this he must restore. This action was instituted simply because the Washington Department of Labor and Industries cut off his payments and ordered him to repay all moneys received. The Attorney General wrote:

> "It is our opinion that the Department misinterpreted the statute when it allowed Mr. Dougall's claim; that his right should have been limited to recovery under the Federal Employers' Liability Act and that expenditures made by the Department in the amount of $8,690.70 should be refunded." (No. 15544, Tr. 13-14)

Furthermore, respondent's innuendoes that Dougall has probably received considerable sums since that time is completely outside the record and is untrue. Dougall has received a few hundred dollars which he is under a continuing duty to restore.

In any event can it be an adequate excuse for a denial of Federal rights that an individual has been partially and inadequately (and in this case erroneously) compensated from another source?

4. Respondent asserts petitioner should be precluded because 33 months elapsed between the entry of judgment and filing of this motion (Br. 7). This only presents half the picture. Seven months earlier, an independent action was filed in the same court (No. 8635) asking that the separate and untried issue of SAA be heard. This independent action was dismissed 6 months later by District Judge East who stated plaintiff should revive the case at bar because SAA had not been "adjudicated in said cause but, on the contrary reserved." (Memo. No. 1, 1956).

Mr. Watkins assumed the untried issue would be set for trial without filing additional pleadings because the issue had been specifically "reserved" for later determination. The District Court, in making its findings, noted:

"The FELA was segregated for separate trial by the Court," the parties had offered certain evidence and had "rested on this issue," and it had "considered all matters of fact and law presented by the parties on trial and in their arguments and brief touching the